STATE OF MAINE

Board of Overseers of the Bar
Grievance Commission
File Nos. 90-S-211
and 90-S-212

BOARD OF OVERSEERS OF THE BAR)
)
v.)
) PANEL REPORT
ELIZABETH KELLY EBITZ)
and)
JUDITH W. THORNTON)

By Petition dated September 27, 1991, the Board of Overseers of the Bar charged Respondents with violation of at least Bar Rules 3.1(a); 3.2(f)(1), (f)(2), (f)(3) and (f)(4); 3.6(a); 3.6(e); 3.6(l)(1); and 3.7(b).

On January 10, 1992, at Bangor, a hearing open to the public was held before Panel A of the Grievance Commission. Present were Gerald F. Petruccelli, Esq., presiding, and Jon S. Oxman, Esq., (both of whom were substituting for the regular lawyer members of Panel A) and Lawrence C. Hadley (the public member of Panel A). There was no objection to the composition of the Panel. Both Respondents were represented by counsel. Petitioner was represented by Bar Counsel.

At the Hearing, the following witnesses testified, all under oath: Respondent Elizabeth K. Ebitz, Esq.; Respondent Judith L. Thornton, Esq.; Jules L. Mogul, Esq.; Deborah Feeney and Vicki Surra, formerly legal secretaries in Respondents' office; James

Surra; Glen L. Porter, Esq.; and Joanne Goldman who had been Respondents' client at the time of the events in question. Respondent Ebitz also called Diane Schetky, M.D., a psychiatrist, to testify as an expert witness.

At the Hearing, Board Exhibits 1 through 13 were admitted without objection, and Respondent Ebitz' Exhibits 1 through 3 were admitted without objection. Among the Exhibits were the original of Mr. Porter's notebook which is the centerpiece of the controversy (Board Exhibit 13) and partial transcripts of Chambers Conferences before Justice Silsby on October 19, 1990 (Board Exhibit 6) and October 22, 1990 (Board Exhibit 7).

During the course of the proceedings, both Respondents have acknowledged violations of one or more Bar Rules. The dispute therefore is about the appropriate sanction. With respect to Respondent Ebitz, the Panel finds probable cause to file an information with the Court seeking suspension or disbarment. Since the proceedings before the Court are de novo, it is not necessary for the Commission to issue findings or conclusions. Maine Bar Rule 7(e)(6)(D).

Respondent Thornton argues that the correct disposition of the grievance against her is a reprimand. Bar Counsel contends that the Panel ought to find probable cause for filing an information against Respondent Thornton. For reasons to be detailed below, the Panel has determined that the proper disposition of the Thornton matter is a reprimand. Maine Bar Rule 7(e)(6)(C). In short, the Panel agrees with Bar Counsel that the conduct is

sufficiently serious to justify suspension or disbarment but the Panel agrees with Respondent Thornton that the absence of aggravating factors and the presence of several mitigating factors lead to the conclusion that reprimand is the more appropriate form of discipline for her.

FINDINGS

It is undisputed that Respondents were representing the Plaintiff Joanne Goldman in an action against her parents Sol Goldman and Gladys Goldman and that the litigation was uncommonly contentious. The case was aggressively and intensively litigated.

It is essentially undisputed that Glen L. Porter, Esq., was attorney for one of the Defendants, that Mr. Porter maintained a black three-ring binder in which he had placed selected papers of particular importance to him in the conduct of the trial, that Mr. Porter's notebook was sometimes left in the courtroom overnight and that, on one occasion, Mr. Porter's notebook was removed from the courtroom by Respondent Ebitz. There appears to be some dispute, which need not be resolved for purposes of the case against Respondent Thornton, about whether Respondent Ebitz accidentally or intentionally removed Mr. Porter's notebook from the courtroom or whether Respondent Ebitz took other papers. What is clear for present purposes is that Respondent Thornton had absolutely nothing to do with the removal of the notebook from the courtroom.

At some point after Respondent Ebitz had returned to her office from Court, she disclosed to Respondent Thornton that she had the Porter notebook. Respondent Ebitz told Respondent Thornton that she wanted to read it, but that she did not have time to read it, and that therefore they should copy it. Respondent Thornton immediately objected to the copying but Respondent Ebitz did not accept her advice. Respondent Thornton then participated in the process of making the photocopies and returned the Porter notebook to the courtroom later that afternoon. Respondent Thornton gained access to the locked courtroom by telling Court personnel that she needed to retrieve something of her own from the courtroom. Whether or not that statement was technically accurate as far as it went, it was intentionally and materially deceptive in its incompleteness.

Subsequently, Respondent Ebitz organized and tabbed the photocopies and spent some amount of time reading them. Respondent Thornton had little or nothing more to do with the copies.

CONCLUSIONS

Respondent Ebitz testified that she reviewed the Bar Rules and erroneously concluded that the conduct was not prohibited. One of the recognized risks of highly specific rules of conduct is that persons intent on doing only the minimum required by the rules may find themselves erroneously supposing that conduct of this kind is permissible because no rule in so many words pro-

vides expressly that a lawyer shall not surreptitiously photocopy the work papers of other lawyers.

Rule 3.1(a), however, condemns all conduct unworthy of an attorney. It does not require careful analysis of the text of the rules to know that the conduct admitted here is unworthy. Since all lawyers have substantial obligations to their clients to preserve confidences and secrets, each lawyer must not only protect the legitimate confidences or secrets of his/her own clients but must also reciprocally honor and respect those obligations of other lawyers to their clients. The conduct of these Respondents plainly constitutes conduct unworthy of an attorney.

Rule 3.2(f)(3) and (f)(4) also supplement the more specific rules by generally prohibiting all conduct involving dishonesty, fraud, deceit or misrepresentation and all conduct that is prejudicial to the administration of justice. The conduct of these Respondents in this matter violates both of those provisions. Their surreptitious copying and retention of the contents of Mr. Porter's notebook and the pretextual device used to return the original to the courtroom to avoid arousing Mr. Porter's suspicion, combined with their removal of the photocopying machine to a less visible area of the office while the copying occurred, were dishonest and deceitful.

It is also clear that this conduct in fact materially disrupted the trial of the Goldman case leading to the substitution of counsel for the Plaintiff in the middle of a bitterly contested trial involving not only a claim for a large amount of

money in damages, but intensely emotional disputes about profoundly important human relationships: daughter and parent and husband and wife. After all of the work that had gone into the preparation for that trial, the conduct of Respondents which disrupted the trial in this fashion was certainly prejudicial to the administration of justice.

Bar Counsel also charges violation of Rule 3.2(f)(1) and (f)(2), Rule 3.6(a), Rule 3.6(e) and Rule 3.7(b). Given the findings and conclusions stated above, and given Respondent Thornton's acknowledgment of violation of some Bar Rules, the Panel does not consider it necessary to give close consideration to these additional allegations. Generally, however, it may be noted that none of the cited rules is a better or more closely applicable basis for discipline than the rules cited above. Rule 3.6(a) proscribes taking on cases that one cannot reasonably expect to handle properly but Respondent Thornton did not participate in any decision about the acceptance of the Goldman case; she simply accepted salaried employment in the office of Respondent Ebitz. Rule 3.6(a) also obligates the lawyer to use good judgment; all conduct unworthy of an attorney certainly involves bad judgment but otherwise that provision has no added significance. There does not seem to be any evidence that Respondent Thornton advised any client to violate any law (Rule 3.6(e)) or that she participated in the falsification of any evidence presented or to be presented at the Goldman trial,

although she did fail to report her own misconduct.[1] Again, Rule 3.1 and Rule 3.2(f)(3) and (f)(4) seem more fitting than Rule 3.7(b). Rule 3.2(f)(1) and (f)(2) likewise seem redundant if applicable to these events. The Panel does not mean to imply that the admitted conduct is any the less objectionable but only that the Panel considers these other rules to be either inapplicable or less directly implicated than Rules 3.1 and 3.2(f)(3) and (f)(4).

DISCIPLINE

Although the Panel has no doubt that suspension or disbarment could be imposed for the violations described above, the Panel has concluded that there are circumstances, including those to be found here, in which reprimand is a sufficient sanction.

It is to be remembered that a reprimand is discipline. The question before the Panel, therefore, is whether a reprimand is sufficient discipline and conversely whether suspension or disbarment is either necessary or useful discipline. On careful consideration of all of the arguments on both sides, the Panel has concluded that the reprimand is sufficient and that suspension or disbarment would serve no useful purpose with respect to Respondent Thornton.

In the Panel's view, the most important point is that Respondent Thornton initially objected to the copying,

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[1]The matter was disclosed to the Court by members of the office staff employed by Respondent Ebitz. The Panel concurs with Bar Counsel's observation that these individuals are to be commended for doing so.

reluctantly went along with it, and has testified that she has spent all these months asking herself why she did it. She herself has characterized her conduct as "dishonorable." She states that she has no excuse and that she is very disappointed in herself for having made the wrong choice. She has explicitly disclaimed the testimony presented by Respondent Ebitz and Dr. Schetky, by way of mitigation or exculpation, based on Respondent Ebitz' own experiences as a victim of abuse and asserted parallels between Respondent Ebitz and Ms. Goldman leading to "counter-transference." Respondent Thornton wanted it made clear that she herself has not been the victim of any such abuse; she said she "has embarrassed [her] family enough just by being here."

It is clear from Respondent Thornton's testimony that she does not need anything more than a reprimand to impress upon her the seriousness of her misconduct. Disbarment would, in the Panel's view, be too severe for Respondent Thornton's secondary role in this incident and suspension would merely disrupt her life and interrupt her ability to serve her clients without countervailing benefit to her, the profession, the Court or the public. Suspension therefore would be counterproductive.

Although Respondent Thornton has stated that she has no excuse for her conduct, the evidence did present a number of points which may be considered in mitigation. Respondent Thornton was a relatively inexperienced lawyer who was a salaried employee of Respondent Ebitz. It should be understood that the

Bar Rules bind every lawyer from the first day of practice and that inexperience is no excuse for prohibited conduct. Inexperience may, however, be considered as part of a larger set of factors in determining what level of discipline ought to be imposed for an admitted violation. Further, the Panel emphasizes that it is absolutely no excuse or justification for an employed lawyer to follow the directions of the employer, or the client, in violation of any Bar Rule. Again, however, where violation has been admitted, and the question is what sanction is appropriate, the fact that Respondent Thornton initially objected to the copying and then followed the lead of Respondent Ebitz is entitled to consideration.

Respondent Thornton apologized to the Court and recognized clearly in her testimony before the Panel that she had created a difficult situation for the Judge and for the parties including particularly her client.

At the time of the Goldman trial, the testimony makes clear that Respondent Thornton was working entirely too many hours and felt overwhelmed by the challenge of competing on equal footing with four large law firms. She testified that she would like to be able to say that she was too tired to think straight but she knows nevertheless that she should have made the correct decision. Again, fatigue and stress are no excuse for violation of the rule but they are legitimate considerations in evaluation of a sanction.

Respondent Thornton testified concerning the substantial changes she has made in her own work habits and lifestyle. She has made, and apparently implemented, a commitment to live a more balanced life and to protect herself from the kinds of stressful circumstances which were operative at the time of these events.

Finally, Respondent Thornton has no prior disciplinary record.

Part 9 of the 1991 edition of the ABA Standards for Imposing Lawyer Sanctions enumerates ten aggravating factors. The Panel finds none of them to be present here. The same publication enumerates thirteen mitigating factors. The Panel finds several of them operative in this matter. They are:

(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive; . . . .

(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

(f) inexperience in the practice of law; . . . .

(j) interim rehabilitation; . . . .

(l) remorse; . . . .

In addition, the stress and fatigue demonstrated in the record may qualify either under (c) personal or emotional problems or (h) physical or mental disability or impairment, although it is not entirely clear which, if either, is the appropriate category.

The Panel fully accepts Petitioner's argument that this conduct in and of itself could support suspension or disbarment but the Panel concludes that consideration of the mitigating

factors and the absence of any aggravating factors supports instead imposition of a reprimand.

DISPOSITION

1. The Panel finds probable cause for filing an information against Respondent Ebitz.

2. The Panel finds probable cause for issuance of a reprimand to Respondent Thornton and directs Bar Counsel to deliver the reprimand to her through her attorney of record. Maine Bar Rule 7(e)(4).

DATED: February 24, 1992

Gerald F. Petruccelli
Hearing Panel Chair

Jon S. Oxman

Lawrence C. Hadley